



AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

12 April 2019

Manager
Financial Services Reform Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600
E: enforceablecodes@treasury.gov.au

Dear Sir/Madam,

Enforceability of financial services industry codes

The Australian Collectors & Debt Buyers Association (ACDBA) is pleased to provide the attached Submission in response to The Treasury's Consultation Paper: *Enforceability of financial services industry codes*.

If any additional information is required in respect to this Submission please don't hesitate to contact the writer.

Yours sincerely,

AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

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DEBT BUYERS ASSOCIATION

SUBMISSION TO TREASURY:

Enforceability of financial services industry codes

April 2019

Introduction

The Australian Collectors & Debt Buyers Association (ACDBA) was established in 2009, for the benefit of companies who collect, buy and/or sell debt - the members of ACDBA (refer Appendix 1) represent the majority of the collection market in Australia.

Our members which purchase debt, each hold an Australian Credit Licence and are members of the Australian Financial Complaints Authority (AFCA).

On 16 March 2016, ACDBA launched its inaugural Code of Practice and Code Compliance Monitoring Committee Charter. The Code is binding on all members as a condition of ACDBA membership and was introduced as an important step in evidencing the promotion of an ethical and responsible approach by members.

A Code Compliance Monitoring Committee (CMC) was established under the Code and comprises an independent chair, a consumer representative and an industry representative. The CMC operates in accordance with the terms of the Charter to monitor and report on compliance with the Code and to investigate alleged breaches by members under the Code.

Since the Code commenced, complaints received and dealt with by the CMC have been:

Year	Complaints received	Outcomes			
		No Breach	Breach Established (no Determination)	Breach Established (Determination)	Open
FY 2016	-	-	-	-	-
FY 2017	-	-	-	-	-
FY 2018	1	1	-	-	-
FY 2019	3	1	1	-	1

Currently, the Code and Charter is subject to an Independent Review process.

ACDBA is pleased to provide for Treasury's consideration this submission in response to the Consultation Paper: *Enforceability of financial services industry codes* (Consultation Paper).

Responses to consultation questions

In responding, it is appropriate to first clarify how we have interpreted the terms "voluntary" and "mandatory":

Voluntary – in relation to an industry code we interpret this to mean a code voluntarily drafted by the industry sector usually by a peak industry body as opposed to the situation of an industry participant voluntarily subscribing to be bound by a code.

Mandatory – in relation to an industry code we interpret this to mean a code drafted and imposed by government whether in consultation or otherwise with the industry sector as opposed to the situation of an industry participant being obliged by regulation to be bound by a code.

1. What are the benefits of subscribing to an approved industry code?

Response:

Subscribing to an industry code generally provides to industry sector and consumers benefits, which typically include:

- a. Industry members committing to act ethically and embrace strong corporate governance and standards in dealings with consumers
- b. Predictability and clarity in what consumers can expect when dealing with the industry sector
- c. The setting of appropriate industry practices by industry experts establishing a framework and standards of accountability for industry members for their provision of services to consumers
- d. The elevation of standards across the industry sector going beyond legislative and regulatory expectations and obligations for both consumers and industry

Arguably, subscribing to an 'approved' industry code would offer the additional benefit of increased confidence for consumers stemming from the review and approval of the code by ASIC.

2. What issues need to be considered for financial services industry codes to contain 'enforceable code provisions'?

Response:

Enforceable code provisions should always be strictly limited to core or overarching commitments by industry participants as to how they will deal with consumers.

Before flagging a code provision as an 'enforceable code provision', careful consideration should be given to whether there are already existing methodologies such as legislation, regulations or code obligations which effectively and appropriately deal with any potential risk of consumer harm if the specific obligation were to be breached.

Specific code commitments relating to how an industry sector operates and will deal with consumers in specific situations and processes should not be unnecessarily flagged as 'enforceable code provisions', so as to preserve the effectiveness and value of the intended working of the code.

Where a code monitoring committee identifies any issue involving an 'enforceable code provision' (whether by way of a determination of a breach or by their own motion enquiries) this should be seen as signalling a potential systemic failure of the code and immediate steps should be taken by the committee to investigate and if appropriate correct and prevent any ongoing code failure.

3. What criteria should ASIC consider when approving voluntary codes?

Response:

In responding to this question, we submit the scale and risk of a small industry sector must be weighed up against the potential high costs for such an industry sector in seeking, gaining and maintaining approval by ASIC of its voluntary code.

Keeping in mind the matters set out in ASIC Regulatory Guide 183: *Approval of financial services sector codes of conduct*, we submit the following for consideration:

The review cycle for a code should be carefully determined rather than imposing a single mandatory obligation on all codes.

For large and well-resourced industry sectors, a mandatory three-year review cycle may be appropriate whereas such a cycle will be an excessive impost upon smaller and less resourced industry sectors.

As an example, ACDBA previously carefully considered applying for approval of its voluntary code by ASIC, but reluctantly came to the conclusion the attendant financial impost was simply too great for the limited benefits such approval would provide.

Accordingly, we submit the question of a review cycle for each code should have regard to the scale of the specific industry sector and the associated consumer risks.

One option to address the impost upon and to encourage smaller industry sectors to seek ASIC approval of their voluntary codes would be for government to fund all costs of the ASIC approval processes.

4. Should the Government be able to prescribe a voluntary financial services industry code?

Response:

In the situation where a voluntary financial service industry code exists which the government sees as effective in improving the conduct of industry participants and delivering benefits to consumers, it should be prescribed in circumstances where there is compelling evidence confirmed by empirical data that a wider application of the code is necessary.

5. Should subscribing to certain approved codes be a condition of certain licences?

Response:

The Consultation Paper references recommendation 1.15 of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and that the law should be amended to extend power to ASIC to approve codes of conduct and specifically those relating to Australian Credit Licence (ACL) holders.

Assuming ASIC will be empowered to approve the codes relating to ACL holders, it follows a condition of an ACL should require an applicant to provide evidence of subscription to an appropriate approved code.

6. When should the Government prescribe a mandatory financial services industry code?

Response:

Mandatory financial service industry codes should only be prescribed in circumstances where there is compelling evidence confirmed by empirical data that such a mandatory code is necessary in order to ensure the welfare of consumers and the available voluntary codes have failed.

7. What are the appropriate factors to be considered in deciding whether a mandatory code ought to be imposed on a particular part of the financial sector by Government?

Response:

Further to the response to question 6, we submit that compelling evidence of systemic activities and conduct by industry participants which are detrimental to the interests of consumers should be the most important determinant.

It is important to appreciate the difference between adverse commentary of an industry's activities and conduct (often in the form of generalised alleged breaches) and evidence of actual systemic failings of the industry sector.

8. What level of supervision and compliance monitoring for codes should there be?

Response:

Assuming this question relates to supervision and compliance monitoring of codes by the specific industry sector, we submit each code should provide for an independent code compliance monitoring committee made up of an independent chair, a consumer representative and an industry representative.

Such committee should be tasked with responsibilities including improving the conduct of code subscribers, encouraging continuous improvement in standards of practice within the relevant industry sector and providing assurance to the community. These responsibilities may be achieved through a combination of such actions as:

- annual compliance statements from code subscribers;
- industry data collection;
- own motion inquiries;
- desktop audits; and
- investigation of code breach allegations.

Each code committee should issue and circulate an annual report of its activities available to the public and all stakeholders including ASIC.

Alternatively, if the question relates to supervision and compliance monitoring of codes by ASIC, the level of supervision should be based upon ASIC's review and identification of any concerns emerging from the annual report of the code monitoring committee for the specific code.

Additionally, ASIC has the opportunity to formally consider and determine the effectiveness of each code upon the regular periodic review of the code pursuant to ASIC's code approval processes.

9. Should code provisions be monitored to ensure they remain relevant, adequate and appropriate? If so, how should this be done and what entity should be responsible?

Response:

The regular periodic review of an industry code as referred to elsewhere in this submission is the most appropriate method for ensuring a code remains relevant, adequate and appropriate for the circumstances and dealings of the specific industry sector.

If the code is a voluntary industry code then the industry sector is the appropriate entity to coordinate the review including inviting relevant stakeholders to contribute to the continuous improvement of the code. Once all perspectives have been received and considered by the industry sector, including seeking the endorsement of subscribers for any updated version of the code, the entity would then submit the code to ASIC to follow its approval process.

If the code is however a mandatory industry code then the government would be the appropriate entity to coordinate the review process.

10. Should there be regular reviews of codes? How often should these reviews be conducted?

Response:

Regular reviews are warranted to ensure a code remains relevant and appropriate to the actual workings of the industry sector it covers.

Typically, codes will provide for a regular review to be undertaken every three years, however such a stipulation is not appropriate for all codes. We submit factors which should be considered in setting an appropriate cycle for a regular review of a code include:

- a. Is adherence to the code mandatory or voluntary for industry participants?
- b. How many industry members are bound by and actually fund the code?
- c. The experience of allegations of breaches of the code – number of allegations made and the seriousness or otherwise of the allegations.
- d. The size of the industry sector.

Consideration should be given to flexibility in determining a regular review cycle for codes. A small industry sector with a limited experience of allegations of breaches of its code is in reality in a situation where the impost of a three yearly review cycle would be too great in all of the circumstances and should be able to determine that a regular review of its code be undertaken every five years or more often, as required or determined by the industry sector to respond to changing circumstances.

11. Aside from those proposed by the Commissioner, are there other remedies that should be available in relation to breaches of enforceable code provisions in financial service codes?

Response:

We submit no further remedies are required.

12. Should ASIC have similar enforcement powers to the Australian Competition and Consumer Commission (ACCC) in Part IVB of the Competition and Consumer Act in relation to financial services industry codes?

Response:

The need for enforcement powers to be vested in ASIC is appropriate if ASIC is to be effective in overseeing and regulating the approval of financial services industry codes.

The Government should ensure there is no conflict in or duplication of the respective oversight responsibilities for financial services industry codes by ACCC and ASIC.

Compliance obligations for the financial services industry are presently unnecessarily complex and extensive - any proposed legislative effort to improve the workings of the industry should be prefaced on streamlining the compliance burden and removal of ambiguity of obligations for industry participants.

13. How should the available statutory remedies for an enforceable code provision interact with consumers' contractual rights?

Response:

The statutory remedies available to a consumer for a breach of promise in a code should be in addition to any other cause of action the consumer might otherwise have under other general law or legislation.

14. Should only egregious, ongoing or systemic breaches of the enforceable provisions of an industry code attract a civil penalty?

Response:

We submit a civil penalty should only be used in situations of egregious, ongoing or systemic breaches of the enforceable provisions of an industry code.

Isolated and non-systemic breaches should be seen for what they are: aberrations to otherwise good and lawful conduct by the industry participant. Accordingly, we respectfully submit the imposition of a civil penalty in such circumstances would be disproportionate and unfair.

15. In what circumstances should the result of an external dispute resolution (EDR) process preclude further court proceedings?

Response:

The point made by the Royal Commissioner is apt – essentially, he is establishing there should be no opportunity for venue shopping for a better outcome of complaints by consumers and this is to be applauded.

We submit the only circumstance for a consumer to pursue further court actions after an EDR determination should be if the industry participant has ignored the EDR determination.

Where an industry participant has fully complied with an EDR determination but finds the specific consumer refusing to meet his or her obligations pursuant to the financial agreement then the previous EDR process should not be a bar to the commencement of court proceedings for recovery of outstanding monies owed by the consumer.

16. To what matters should courts give consideration in determining whether they can hear a dispute following an Australian Financial Complaint Authority (AFCA) EDR process?

Response:

A very real and ongoing industry concern in relation to the EDR process involving AFCA is the absence of the right of an appeal to the rule of law for determinations made by AFCA. The processes of AFCA cannot ensure that errors by AFCA officers will not be made.

Already, industry members have pointed to situations where AFCA officers resolve matters without understanding and taking into account the relevant applicable regulatory context for individual disputes - for example, the application by AFCA officers of National Credit Code (NCC) obligations on telecommunication debts which are outside the remit of the NCC regime.

In other examples, industry members point out AFCA officers when considering disputes relating to credit default information on a consumer's credit file often require changes without regard to the limited circumstances available to a financial service provider to amend a default entry given the obligations of the Credit Reporting Code of Practice.

We respectfully submit providing the right of appeal by industry members to the rule of law for AFCA determinations is an imperative for legislative amendment. This would ensure fairness and equity for all parties given consumers presently have the right to not accept AFCA determinations.

Responding to the question above, we submit:

- A. If a consumer does file further court proceedings, the court should be required to take note as to whether the industry participant (the defendant) had fully met its obligations as set out in the EDR determination and if so, the cause of action should not otherwise proceed.
- B. Similarly, if the industry participant having fully complied with an EDR determination commences further court proceedings against the consumer, the court should be required to take note whether the consumer had subsequent to the EDR determination met his or her residual obligations pursuant to the financial agreement, being the basis of the proceedings. If the consumer has failed to meet those obligations the cause of action should proceed.

17. What issues may arise if consumers are not able to pursue matters through a court following a determination from AFCA?

Response:

We foresee no issues arising from consumers being limited in their ability to pursue matters through a court. Instead such limitation reinforces support to the view that they will receive a considered, fair and independent outcome through AFCA.

Contact

Enquiries in respect to this Submission should be directed in the first instance to:

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APPENDIX 1 - Listing of Members of Australian Collectors & Debt Buyers Association

- ACM Group Ltd
- Axess Australia Pty Ltd
- Baycorp (Aust) Pty Ltd
- CCC Financial Solutions Pty Ltd
- CFMG Pty Ltd
- Charter Mercantile Pty Ltd
- Collection House Limited (ASX: CLH)
- Complete Credit Solutions Pty Ltd
- Credit Collection Services Group Pty Ltd
- Credit Corp Group Limited (ASX: CCP)
- Credit Four Pty Ltd
- Credit Solutions Pty Ltd
- Illion Australia Pty Ltd
- PF Australia Pty Ltd
- Prushka Fast Debt Recovery Pty Ltd
- Shield Mercantile Pty Ltd